**recent DEVELOPMENTS in**

**OKLAHOMA business and corporate law ‑ 2022**

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### Introduction

We opened last year’s paper saying we are gradually recovering from the COVID-19 pandemic and its profound impact on our lives.[[1]](#footnote-1) The economy appeared to be approaching pre-pandemic levels.[[2]](#footnote-2) It seemed we were returning to normality. That assessment was faulty. COVID-19 was more stubborn than anticipated, although its lethality diminished, and we learned to live with it. The economy suffered unexpected jolts. Russia invaded Ukraine in February 2022, which triggered massive economic sanctions and disrupted energy and agricultural markets. Inflation rose to levels not experienced in a half century, and central banks responded by raising interest rates to slow demand. The stock markets have fallen. The risk of a recession looms.

As we face these economic stresses, we should ask how the stresses might impact recent trends in corporate law and governance. One notable trend has been the focus on environmental, social and corporate governance betterment. ESG pushes companies to look beyond their shareholders to consider the needs of other stakeholders and the broader world. The ESG push was strongly supported by the financial markets, but we have recently seen some backlash, especially at the state level. Might economic stresses mitigate the ESG trend?

Another trend has been for greater transparency in the beneficial ownership of legal entities. In 2021, Congress passed the Corporate Transparency Act (the “*CTA*”).[[3]](#footnote-3) It will require the reporting of beneficial ownership for business entities formed or operating in the U.S. It will also impact the lawyers who form legal entities. Those lawyers will report their client’s ownership to the Treasury’s FinCEN database. They may also report themselves to the database as company applicants. For lawyers forming legal entities, this is a major change and we shall cover this development in some detail.

We shall also review the governance rules for distressed companies and cover new Oklahoma and Delaware cases in corporate law.

### The Trend for ESG

The markets are increasingly using environmental, social and corporate governance or ESG factors in their investment analyses to identify material risks, sustainability and growth opportunities.[[4]](#footnote-4) ESG evaluates the impact a company has on its employees, the environment, and the communities where it operates. ESG can be considered a measure of corporate responsibility.

Institutional investors increasingly believe that various forms of corporate responsibility are intangible assets that can build enterprise value.[[5]](#footnote-5) To measure ESG, financial analysts develop metrics that assess a company’s level of ESG commitment. Sensing the market trends and financial benefits, companies are engaging in self-evaluations and issuing reports that aid in ESG quantification and rankings.[[6]](#footnote-6)

In the environmental area, analysts and companies attempt to measure the impact that a company’s operations have upon the air, water, ecosystems and human health. With the increasing recognition of the hazards of climate change, they will measure greenhouse gas emissions, the impact on biodiversity, and waste and water management practices. ESG will assess the sustainability of a company’s operations, including its long-term access to resources and raw materials and future markets for its production.

The social factors include employee diversity, safe working conditions and consumer protection. For agriculture and food producers, social factors would include animal welfare practices.

Corporate governance has a longer history than environmental and social factors. Reforms after the Enron and similar corporate collapses emphasized the need for stronger internal controls and checks on management actions. This led to greater board independence, disclosures relating to executive compensation, and stronger auditing practices. The growing influence of institutional investors, guidance by proxy advisory firms, and more activist shareholders have encouraged better corporate governance.

The Business Roundtable, which represents many of America’s largest companies, issued a statement in 2019 on “the purpose of a corporation”. It said businesses should no longer advance only the interests of shareholders, but must also invest in their employees, support their communities, protect the environment and deal fairly with their suppliers.[[7]](#footnote-7)

Larry Fink, CEO of BlackRock, the world’s largest investment management firm, has been a vocal proponent of ESG investing. In his most recent annual letter, he wrote “we are asking companies to set short-, medium-, and long-term targets for greenhouse gas reductions. These targets, and the quality of plans to meet them, are critical to the long-term economic interests of your shareholders.”[[8]](#footnote-8) He encouraged companies to make reports based on the Task Force on Climate-related Financial Disclosures. BlackRock’s position emphasizes a long-term, sustainable approach and a belief that profits and social responsibility are complimentary, not incompatible. A company’s better treatment of its employees, customers, community and the environment improve its chances for long-term sustainability.

Despite weakening economy, support for ESG principles remains strong. A recent survey by the global accounting firm, KPMG, of 1,325 global CEOs across 11 markets between July 12 and August 24, 2022, found increasing support for ESG initiatives and a growing belief that ESG programs will improve financial performance. The survey asserts that “CEOs increasingly understand that businesses embracing ESG are best able to secure talent, strengthen employee value proposition, attract loyal customers and raise capital.”[[9]](#footnote-9)

#### The Backlash Against ESG

ESG support is not universal. Recent criticism has focused on the lack of standard, objective criteria for measuring ESG. Under the current system, companies and the funds that invest in them can largely write their own criteria and shape it to support a desired outcome. If everyone sets their own standards, everyone can be a winner. This practice – called greenwashing – undermines the objectives sought by ESG: improving capitalism and slowing climate change.[[10]](#footnote-10)

The problem is enhanced by poor correlation among the multiple rating agencies.[[11]](#footnote-11) A recent study of six agencies found they used over 700 metrics across 64 categories, only ten of which were common to all. Earlier this year, the S&P Dow Jones ESG index booted Tesla from the index while companies like ExxonMobil remained. Arms makers were largely excluded until the Russian attack on Ukraine, when they were feted as defenders of democracy.[[12]](#footnote-12)

The solution is to fix better measures and improve disclosures. That will likely come from better regulatory oversight. The Securities and Exchange Commission (“*SEC*”) has proposed regulations addressing company disclosures relating to climate-change.[[13]](#footnote-13) The proposal would mandate disclosure on climate-related risks to a company’s current and future business, the risks related to climate-related events, its greenhouse gas emissions, including the impact of its entire value chain, and details on other climate-related targets and whether it is meeting them. For large reporting companies, the information would be audited.

The SEC’s proposal is one piece of the international efforts to address ESG disclosures. The European Union has also proposed regulations, which would assess a company’s impact on people and the environment. It is pushing for corporate sustainability reporting, which would impact an estimated 49,000 companies. The International Sustainability Standards Board[[14]](#footnote-14) has also proposed disclosure regulations. The global activity reflects the need for international correlation for effective standard-setting.

Standardized measures and improved disclosures would theoretically enable investors to determine how exposed a company is to climate-related risks and other externalities. This would either drive its share price and store of capital up or penalize it if it failed to respond. For the markets to respond efficiently, the standards must be universal and transparent so that the long-term, sustainable activities of companies can be accurately assessed.

Some of the ESG backlash has been political. The push for ESG strikes some conservative politicians as a “woke” demand that companies must establish their ESG credentials to find value in the markets. The political backlash is particularly acute at the state level. It was led by Texas Governor Greg Abbott, who signed legislation in 2021 requiring the state’s retirement and investment funds to divest from businesses that boycott fossil fuel companies.[[15]](#footnote-15) Other states followed with more than 20 states adopting some type of policy penalizing investment funds and other businesses that disassociate with companies for ESG reasons.[[16]](#footnote-16)

One of the states was Oklahoma, which adopted the Energy Discrimination Elimination Act of 2022,[[17]](#footnote-17) which became effective November 1, 2022. The act requires the State Treasurer to maintain and provide to each state governmental entity a list of financial companies that boycott energy companies.[[18]](#footnote-18) State agencies are required to divest from any listed financial company within prescribed periods, subject to certain exceptions.[[19]](#footnote-19) State agencies are also prohibited from contracting with listed financial companies. The act indemnifies any government employee or contractor for actions taken under the act.[[20]](#footnote-20) The act prohibits any retirement system beneficiary from suing for actions taken under the act and imposes attorney fees for a violation of the prohibition.[[21]](#footnote-21)

Some political backlash is unavoidable when ESG values appear to conflict with the interests of local companies. But the primacy of ESG is long-term sustainability correlated with investment performance. Better investment performance is a goal that is in everyone’s best interest. If the ESG aligns with the interests of the voters, the political backlash should subside.

### The Corporate Transparency Act

The Corporate Transparency Act (the “*CTA*”)[[22]](#footnote-22) is perhaps the most significant development for transactional lawyers since promulgation of the LLC acts. It requires the reporting of beneficial ownership for most legal entities formed or operating in the U.S.[[23]](#footnote-23) It covers existing entities and future entities. The CTA will profoundly affect the way lawyers interact with their clients when forming legal entities.[[24]](#footnote-24) A careful review of its requirements and their implications is warranted.

#### Reporting Companies

The CTA will require “reporting companies” to report their beneficial ownership to the Department of Treasury’s Financial Crimes Enforcement Network (“*FinCEN*”). The CTA is the result of more than a decade of effort to require the reporting of U.S. beneficial ownership for business entities. The reporting is intended to “crack down on anonymous shell companies, which have long been the vehicle of choice for money launderers, terrorists, and criminals.”[[25]](#footnote-25)

Subject to a few exemptions, legal entities formed with a Secretary of State filing must report.[[26]](#footnote-26) In addition, legal entities operating in the U.S., regardless of when or where they were formed, must also report.[[27]](#footnote-27) This will include all domestic corporations, LLCs, and limited partnerships and foreign entities doing business in the U.S. FinCEN estimates that there are approximately 32.6 million entities currently operating within the U.S. that will be subject to reporting and over three million new entities formed annually that will be subject to reporting.[[28]](#footnote-28)

#### Beneficial Ownership

The reports cover beneficial owners with “substantial control” over the entity or ownership or control of 25% or more of the ownership interest.[[29]](#footnote-29) Substantial control is deemed to exist if the person directs, determines or has substantial control over the important decisions, such as a dissolution or merger, major expenditures, borrowings or investments, management compensation, the termination or fulfillment of significant contracts or the amendment of constituent documents.[[30]](#footnote-30)

A beneficial owner is also a person with “significant responsibility to control, manage, or direct” the entity, including board members and senior officers. Senior officer is defined as a “president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of title, who performs a similar function.”[[31]](#footnote-31)

A beneficial owner does not include a minor child, a nominee or custodian for another person, an employee (not a senior officer), or a creditor.[[32]](#footnote-32)

#### Company Applicants and Lawyers

The CTA’s reporting requirements also cover a “company applicant”, who is an individual “who directly files the document that creates the domestic reporting company” or the “document that first registers the foreign reporting company.”[[33]](#footnote-33) A company applicant also includes the “individual who is primarily responsible for directing or controlling the filing if more than one individual is involved in the filing of the document.[[34]](#footnote-34) The rule acknowledges that, under these definitions, the person filing the formation document may be a legal assistant and the person primarily responsible may be an attorney. In that case, both would report as company applicants.

Some lawyers may be reluctant to assume that role. Lawyers who only occasionally form legal entities may be inclined to refer out the work. Lawyers in group practices may designate a lawyer who forms all entities on the group’s behalf.

For transactional lawyers, avoiding the role as company applicant may be difficult. They have traditionally drafted the entity constituent documents and filed the formation documents for their clients. Clients have come to rely on these services and may be reluctant to change. Most clients are ill-equipped to form their own entities and need legal assistance. Their lawyers will be responsible for “directing or controlling” the filings.

#### Reported Information

The reporting company will submit its full legal name, any trade name or d/b/a, the street address of its principal place of business, the jurisdiction of its formation, and its EIN. Each beneficial owner and company applicant will report his or her full legal name, date of birth, the beneficial owner’s residential street address, the company applicant’s business street address, and the individual’s unique identifying number from a passport, driver’s license or other government issued identifying document. The beneficial owner and company applicant must also submit an image of the unique identifying document.[[35]](#footnote-35)

#### Effective Date

The FinCEN reporting requirements will begin January 1, 2024. A reporting company formed before January 1, 2024, must report within one year. A reporting company formed on or after January 1, 2024, must report within 30 days of formation.[[36]](#footnote-36) If the beneficial ownership information changes or the reporting company becomes subject to an exemption or loses an exemption, the reporting company must file an amended report within 30 days.[[37]](#footnote-37) Changes in the information about company applicants need not be updated.

#### Access

The reports are not open to general public, but will be accessible to (a) Federal or state agencies engaged in national security, intelligence, or law enforcement activity; (b) Federal agencies acting on behalf of certain foreign authorities; (c) U.S. financial institutions “subject to consumer due diligence requirements” with the consent of the reporting company;[[38]](#footnote-38) or (d) a “Federal functional regulator” or other regulatory agency to assess or otherwise ascertain compliance of financial institutions.[[39]](#footnote-39)

#### Penalties for Noncompliance

Reporting companies and beneficial owners may face fines and jail time for willfully failing to report or falsely reporting.[[40]](#footnote-40)

#### Lawyers Notifying Clients About CTA

Lawyers are ethically required to provide competent representation, which includes keeping abreast of changes in the law.[[41]](#footnote-41) They are also required to keep their clients reasonably informed.[[42]](#footnote-42) Since the CTA applies to existing entities, lawyers must consider whether they will notify clients about the new reporting requirements and, if so, which clients they will notify.[[43]](#footnote-43) For experienced transactional lawyers, the pool of clients receiving notice may be quite large. Lawyers may start by sorting the entities they have formed or advised, determining whether the entities are likely reporting companies, and asking whether the entity would expect the lawyers to contact them and advise them about the CTA’s new requirements?[[44]](#footnote-44) Clients with ongoing relationships would likely expect contact. Entities formed years ago with little subsequent contact may not expect notification.

Filing for a reporting company formed years ago may pose some difficulty. Presumably the reporting company will report its current ownership and has no requirement to report historical ownership. Having an interest in the reporting company, current ownership should be motivated to cooperate in the process. That would not be true for prior ownership with no present interest. Existing reporting companies need not file company applicant information.

#### Changes for Lawyers

For lawyers accepting the role as company applicant, it will be imperative to define their duties in an engagement letter. The engagement letter should describe the client’s responsibilities under the CTA and state who will prepare and file the formation document, who will gather and file the FinCEN information for the reporting company, beneficial owners, and applicants, and how updating the reports will be handled.[[45]](#footnote-45) The engagement letter should also identify the client as the reporting company and recognize that the beneficial owners and management are not their clients. If not a client, the beneficial owners will not enjoy the duties owed to clients, such as a duty of confidentiality. Nevertheless, the lawyer will be handling confidential information about the beneficial owners and should consider what steps they will take to protect the confidential information of the beneficial owners.

Attorneys practicing transactional law will likely add CTA reporting to the other tasks in forming business entities. That means they will make professional judgments about who is a reporting company and who are its beneficial owners and the lawyers will collect the information required by the report. Since the CTA database is not publicly available, their clients may be asked to represent and warrant CTA compliance in financing, acquisitions and other business transactions. That will require the lawyer’s professional due diligence to properly advise clients. At the least, companies must implement systems for updating their CTA reporting and will be expected to demonstrate CTA compliance. Attorneys will assist in that process.

### Governance in Distressed Companies

A weakening economy will stress more companies. It is worth examining the governance rules for distressed companies. Generally, corporate directors and officers owe fiduciary duties to the company and its shareholders. However, when a company becomes insolvent, that fiduciary duty may extend to the company’s creditors.[[46]](#footnote-46)

Decisions in the recent Toys R Us (“*Toys*”) bankruptcy illustrate these principles.[[47]](#footnote-47) The creditors alleged that the Toys directors and officers breached their fiduciary duties by approving pre-petition retention bonuses to executives and management-level employees when Toys r Us was insolvent.

The defendants argued they were protected by the business judgment rule and the exculpatory clause in the Toys charter.[[48]](#footnote-48) The business judgment rule creates a presumption of propriety, which can be rebutted by showing a breach of the duty of loyalty or an act taken in bad faith.[[49]](#footnote-49) If rebutted, the burden shifts to defendants to show that the transaction was entirely fair both in dealing and price.[[50]](#footnote-50)

The court denied defendants’ motion for summary judgment, saying that the creditors had shown that defendants were conflicted, ignored material information, and largely allowed the CEO to implement the bonus plan, even though he was the largest recipient under the plan. With the conflict, defendants must show entire fairness in the plan’s scope and implementation, which they were unlikely to do.

The creditors also attacked pre-petition advisory fees paid to three financial advisors, which were also Toys’s majority shareholders. The creditors claimed that Toys was insolvent years before the bankruptcy filing and that during the insolvency it paid the shareholders large advisory fees for indeterminate work.

Defendants disputed whether Toys was insolvent when the payments were made and further asserted that the payments were contractually required, which precluded a breach of fiduciary duty.

The court held that in the face of competing expert evidence about insolvency, it could not dismiss the claim under summary judgment. As to the contractual obligation, it noted that the advisory contracts had been amended several times and that directors were duty bound when handling contractual obligations.[[51]](#footnote-51) Whether defendants properly handled the advisory contracts involved factual determinations that could not be summarily dismissed.

### Case Law Developments

#### Oklahoma

*Grand Crest Owners Association, Inc. v. Stites*,[[52]](#footnote-52) is an interesting case that deals with the enforceability of restrictive property covenants in a corporation’s bylaws. Grand Crest was incorporated in 1954 and acquired property on the shores of Grand Lake with 20 cabins. It platted the property into four blocks, designated streets, and subdivided one block with one cabin on each lot. Grand Crest sold the lots and each purchaser became a shareholder in Grand Crest. The bylaws contained covenants providing for the maintenance of the streets and common areas, water, sewer and trash pickup services, building restrictions and insurance, and for monthly dues and assessments to fund Grand Crest’s expenses. The bylaws also granted shareholders rights of first refusal in transfers of the lots. The plat was recorded in 1954. The bylaws were not recorded until 1991.

Grand Crest filed an action alleging that three shareholders and lot owners, Jef and Beverly Stites and O’Connor Legacy Home, LLC, breached the restrictive covenants in the bylaws and refused to pay dues and assessments. Defendants had purchased their lots in 1998, 2002 and 2014. With each lot, they received a stock certificate in Grand Crest. Until the dispute arose, defendants paid their dues and assessments and participated in shareholder meetings.

Defendants answered Grand Crest’s petition claiming that the bylaw restrictions do not apply since they were not recorded with the 1954 plat or in the warranty deeds issued to the original lot owners. Since the restrictions were not recorded, the original lot owners took free and clear of the restrictions. Defendants further argued that the 1991 recording of the bylaws did not apply to them since Grand Crest had conveyed its entire interest with the original deeds and could not later burden defendants’ lots by a subsequent filing of the bylaw restrictions.

The Court of Appeals rejected defendants’ arguments. It began its analysis by holding that the Grand Crest bylaws were duly adopted in the corporation’s 1954 organization and were binding on its shareholders. Since the corporation’s organization, the shareholders had recognized the transfer restrictions that gave existing shareholders a right to reject a proposed sale and the right to buy the selling shareholder’s lot. As provided in the bylaws, the shareholders had paid their monthly dues and assessments to maintain the subdivision.

The court then addressed defendants’ argument that the bylaw restrictions were not binding on the original shareholders since the bylaws were not recorded. Defendants point to the conveyancing statutes, which state that a warranty deed conveys the “whole interest of the grantor”[[53]](#footnote-53) and the deed conveys “an estate in fee simple . . ., unless limited by express words.”[[54]](#footnote-54) Since the bylaws were not previously recorded or attached to the original deeds, there could be no limitations.

But the court noted that defendants’ request for quiet title is an equitable proceeding, and courts will look beyond the technical requirements of the statutes when in equity. Substantial authority held that restrictions imposed by a common grantor for the mutual benefit of all grantees under a general development plan are enforceable even when unrecorded.[[55]](#footnote-55) Further, when the original grantees had actual notice of the bylaw restrictions, equity will hold they are bound by that knowledge.[[56]](#footnote-56)

The court also states that the bylaw restrictions are enforceable under contract law. The Grand Crest stock certificate had a legend providing that “’an essential part’ of the consideration for the initial sale of these lots wea the purchaser’s agreement to be bound by the Grand Crest bylaws.”[[57]](#footnote-57) And the bylaws provide that they “constitute a binding contract between the corporation and its members.”[[58]](#footnote-58) The original grantees became shareholders when they purchased their lots. Regardless of whether the restrictions appear in the chain of title, they were bound by the bylaws.

If the restrictions bound the original grantees, the estate they conveyed to defendants would be bound by the same restrictions. The court found other reasons why defendants would be bound. The bylaws were recorded in 1991, which predates the first purchase by defendants. Thus, defendants had constructive notice of the restrictions and were thus bound. The court also said that defendants were shareholders as well as lot owners. As shareholders, they were contractually bound by the bylaws regardless of whether they had signed the bylaws.

#### Delaware

We see the drive for stronger corporate governance in the decisions of the Delaware courts, as for example in the *Caremark* decision[[59]](#footnote-59) and its progeny, which expanded director responsibilities. In *In re Multiplan Corp. S’holders Litig.*,[[60]](#footnote-60) the Delaware Court of Chancery addressed for the first time how fiduciary duties would apply to special purpose acquisition companies or SPACs. SPACs are shell companies formed by a lead investor, which conduct an initial public offering and commit to use those proceeds to acquire an operating company.

The case is an instructive application of fiduciary principles. The court found that the founding investor was conflicted since he had paid little for his shares while the IPO shareholders had paid fair value. In other words, the IPO shareholders needed more value in the acquisition than what they had paid for their stock. The founding investor would make money even with a bad acquisition. The difference meant that the entire fairness standard would apply to the acquisition. The court also held that the shareholder claims were direct, not derivative. That meant that the shareholders were not required to make demand on the board for action, which avoids a major procedural hurdle.

Manti Holdings*, LLC v. The Carlyle Group Inc.*[[61]](#footnote-61) also deals with fiduciary duties and the proper standard of review. A companion case deals with contractual waivers of those duties. Plaintiffs were minority investors in a company with the private equity group, Carlyle. Plaintiffs claimed Carlyle rushed to sell the company to secure a return on its preferred stock. If the sale had been postponed, the company would have realized a higher price, which would have benefited the common stockholders.

The court held that Carlyle was conflicted. The quick sale did not affect it as it would the common stockholders. The Carlyle directors who approved the sale were not independent. The board had not appointed a special committee or taken other steps to protect the common stockholders. The burden of proof shifted to the defendants and the entire fairness standard would apply. Since evidence indicated that a delay could have resulted in a higher sale price, Carlyle could not meet the standard.

Carlyle also argued that the stockholder agreement between the parties fixed the sales process and the fiduciary duties were inapplicable. Plaintiffs had waived their right to complain. The stockholder agreement contained a “drag along” provision that required the minority stockholders to sell if the sale were approved by the board and the holders of a majority of the outstanding shares, which Carlyle held.[[62]](#footnote-62)

The court examined the “drag along” provision, in which the stockholders agreed to (a) vote their shares in favor of the transaction, (b) refrain from exercising appraisal rights, and (c) execute certain transaction documents. While there was language that stockholders would consent and “raise no objections”, the court held that the language was not explicit enough to constitute a knowing waiver of fiduciary duties. To be effective, waivers must be “clear and unequivocal” and the intent to eliminate fiduciary duties must be “plain and unambiguous” in the document.

### Conclusion

This paper’s premise is that our business entities are trending toward greater corporate social responsibility. The trend is long-standing. It is evidenced in Federal and state laws, by judicial decisions and, perhaps most importantly, in the marketplace. And the trend is accelerating.

As lawyers, we are uniquely positioned to guide our business clients and to encourage greater corporate social responsibility. With our guidance, more businesses might adopt a expanded role in improving the lives of their employees, their customers and people within their communities, if not the nation and the world. Business owners will, in the long-term, benefit from building better relationships.

Greater corporate social responsibility makes for a better marketplace.[[63]](#footnote-63) Markets are more efficient where transparency and trust are found, and transactional risk decreases. The resulting economic benefits help us all.

Gary W. Derrick
November 7, 2022

1. The pandemic took the lives of over 1.0 million people in the U.S., threw a record 22.36 million people out of work in the U.S., and caused the largest contraction in the global economy since World War II. Regarding COVID deaths, see Centers for Disease Control and Prevention, COVID Data Tracker (https://covid.cdc.gov/covid-data-tracker/#datatracker-home, last accessed Oct. 15, 2022); for U.S. job losses, see Elizabeth Weber Handwerker, Peter B. Meyer, Joseph Piacentini, Michael Schultz, and Leo Sveikauskas, “Employment Recovery in the Wake of the COVID-19 Pandemic”, Monthly Labor Review, U.S. Bureau of Labor Statistics (December 2020) (at https://doi.org/10.21916/ mlr.2020.27), and for worldwide economic contraction, see International Monetary Fund, *World Economic Outlook: a Long and Difficult Ascent* (Oct. 2020) (at https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020). [↑](#footnote-ref-1)
2. GDP returned to its pre-pandemic level in the second quarter of 2021. Mitchell Barnes, Lauren Bauer and Wendy Edelberg, “11 Facts on the Economic Recovery from the COVID-19 Pandemic”, *The Brookings Institute* (Sept. 29, 2021). [↑](#footnote-ref-2)
3. On January 1, 2021, Congress passed the Corporate Transparency act as part of the Anti-Money Laundering Act of 2020 (“*AMLA*”), which was included within the National Defense Authorization Act of 2021 (“*NDAA*”); codified at 31 U.S.C. §5336. [↑](#footnote-ref-3)
4. The major financial markets all provide ESG ratings indexes, such as the Dow Jones Sustainability Indices, Bloomberg ESG data, the FTSE4Good Index, and the MSCI ESG Indices. [↑](#footnote-ref-4)
5. The financial markets historically assumed that ethically or socially motivated investment would by its nature reduce returns. Recent research has rebutted that assumption, and many institutional investors, including BlackRock, the world’s largest investment firm, have concluded that greater corporate responsibility equates to higher long-term investment returns. *See* BlackRock, “Sustainable investing: resilience amid uncertainty” (at https://www.blackrock.com/corporate/about-us/sustainability-resilience-research). [↑](#footnote-ref-5)
6. *See e.g*., Microsoft, “Environmental Sustainability Report” (at https://www.microsoft.com/en-us/corporate-responsibility/sustainability/report); ExxonMobil, “Sustainability at ExcxonMobil (at https://corporate.exxonmobil.com/sustainability/sustainability-report#Ourapproach); and Coca-Cola, “2021 Business & ESG Report” (at https://www.coca-colacompany.com/ content/dam/journey/us/en/reports/coca-cola-business-environmental-social-governance-report-2021.pdf). [↑](#footnote-ref-6)
7. The statement was endorsed by business leaders, including the Chairman and CEO of JPMorgan Chase, the former CEO of Vanguard, and the President of the Ford Foundation. (at https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans). [↑](#footnote-ref-7)
8. *See* Larry Fink’s 2022 Letter to CEO’s, “The Power of Capitalism” (at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter). [↑](#footnote-ref-8)
9. KPMG 2022 CEO Outlook. KPMG surveyed. (available at https://assets.kpmg/content/dam/kpmg/xx/pdf/2022/10/ceo-outlook-report.pdf. [↑](#footnote-ref-9)
10. *See gen*., Henry Tricks, “Special Report: ESG Investing”, *The Economist* (July 23, 2022). [↑](#footnote-ref-10)
11. Kevin Prall, “ESG Ratings: Navigating Through the Haze”, *CFA Institute* (Aug. 10, 2021) (available at https://blogs.cfainstitute.org/investor/2021/08/10/esg-ratings-navigating-through-the-haze/). [↑](#footnote-ref-11)
12. *Supra* Tricks, “Special Report: ESG Investing”. [↑](#footnote-ref-12)
13. SEC, The Enhancement and Standardization of Climate-Related Disclosures for Investors (2022), Release Nos. 33-11042; 34-94478, https://www.sec.gov/rules/proposed/2022/33-11042.pdf. [↑](#footnote-ref-13)
14. The ISSB is under the IFRS Foundation, which fixes the financial reporting and accounting standards for international companies. [↑](#footnote-ref-14)
15. *See* David Gelles and Hiroko Tabuchi, “How an Organized Republican Effort Punishes Companies for Climate Action”, *NY Times* (May 27, 2022) (describing the state-level, political backlash against ESG).  *See also* Jon Michael Raasch, “Oklahoma Gov. Stitt: ESG is an anti-American political agenda”, *Fox News* (Oct. 11, 2022) (available at https://www.foxnews.com/ politics/oklahoma-governor-stitt-esg-anti-american-political-agenda). [↑](#footnote-ref-15)
16. The states include Texas, Florida, West Virginia, North Dakota, Oklahoma, Minnesota, Idaho, South Carolina, Louisiana, Idaho, Wyoming, Arizona, Kentucky, Utah, Indiana, Missouri, Ohio and South Dakota. Ellen Kennedy, “The ESG Investing Backlash”, *The Kiplinger Report* (Sept. 6, 2022). [↑](#footnote-ref-16)
17. House Bill No. 2034 by McBride, O’Donnell, West (Kevin), Bashore and Roberts (Sean) of the House and Allen David, Bullard and Bergstrom of the Senate. The bill became effective November 1, 2022, and is codified at 74 O.S. §12001 *et seq*. [↑](#footnote-ref-17)
18. The Treasurer compiles this list from publicly available information including information sourced from nonprofit organizations, research firms, international organizations, and governmental entities. The Treasurer may ask the financial services firm whether it has boycotted an energy company and can make its determination without “further investigation, research, or inquiry . . .” *Id*., §12003.A.1.b. [↑](#footnote-ref-18)
19. A state agency is not required to divest if it will suffer loss, but the agency that does not divest must report to the Treasurer, the presiding officer of each house, and the Attorney General describing “the reason and justification supported by clear and convincing evidence, for deciding to cease divestment.” *Id*., §12003.A.3. [↑](#footnote-ref-19)
20. *Id*., §12001.2.C. [↑](#footnote-ref-20)
21. *Id*., §12001.2.D and E. [↑](#footnote-ref-21)
22. On January 1, 2021, Congress passed the Corporate Transparency act as part of the Anti-Money Laundering Act of 2020 (“*AMLA*”), which was included within the National Defense Authorization Act of 2021 (“*NDAA*”); codified at 31 U.S.C. §5336. [↑](#footnote-ref-22)
23. The CTA clearly covers corporations and LLCs and does not cover general partnerships. It is unclear whether it cover unincorporated associations or business trusts. This scope will presumably be defined by regulation. [↑](#footnote-ref-23)
24. The CTA will expand the lawyer’s “gatekeeper” role when forming new legal entities. The lawyer will likely become a company applicant in the reporting company’s filing, will identify the beneficial ownership, and may assume responsibility for filing the report with FinCEN. [↑](#footnote-ref-24)
25. Office of Representative Carolyn Maloney, Press Release, “Maloney Celebrates Inclusion of Corporate Transparency Act in FY2021 NOAA” (Nov. 19, 2020). [↑](#footnote-ref-25)
26. 31 C.F.R. §1010.380(c)(1). The definition includes legal entities formed or operating under Tribal authority. Entities exempt from the reporting requirements include: publicly traded companies, regulated financial institutions or investment companies, insurance companies, public utilities, tax-exempt 501(c) organizations, and operating entities with a physical presence in the United States, employing more than 20 people, and having filed Federal income tax returns showing more than $5,000,000 in revenue. 31 U.S.C. §5336(a)(11)(B). Subsidiaries of exempt entities and inactive entities are also exempt. Note that the exemption for operating companies covers only existing companies and would not apply to newly formed entities. [↑](#footnote-ref-26)
27. *Id*. [↑](#footnote-ref-27)
28. *See* Final Rule, Section I, footnote 21, and Section V. [↑](#footnote-ref-28)
29. Determining 25% or more of the ownership interest is relatively easy with a single class of interest. For entities with multiple classes of interests, distribution preferences and varying voting and consent provisions, the determination is more difficult. *See* 31 C.F.R. §1010.380(d)(3) for examples. For ownership by trusts, the ownership could be attributed to the grantor, the trustee and the beneficiaries. *See id.* at (d)(2)(ii). [↑](#footnote-ref-29)
30. *Id.* at (d)(1). [↑](#footnote-ref-30)
31. *Id.* at (f)(8). [↑](#footnote-ref-31)
32. *Id.* at (d)(3). [↑](#footnote-ref-32)
33. 31 C.F.R. §1010.380(e). [↑](#footnote-ref-33)
34. *Id*. [↑](#footnote-ref-34)
35. 31 C.F.R. §1010.380(b). FinCEN requires an image of the identifying document because altering the image to falsify the information would be more difficult than entering an incorrect number. The image will also capture the likeness of the individual since the identifying document would have the individual’s picture. An individual’s social security card is not an acceptable identifying document. [↑](#footnote-ref-35)
36. *Id.* at (a)(1). [↑](#footnote-ref-36)
37. *Id*. at (a)(2). [↑](#footnote-ref-37)
38. The CTA rules will largely replace the customer due diligence rules applicable to financial institutions under the Bank Secrecy Act. The financial institutions will be required to collect the beneficial ownership information, but will do so electronically through the FinCEN database. [↑](#footnote-ref-38)
39. *Supra* at §5336(c)(2). [↑](#footnote-ref-39)
40. *Id.* at §5336(h)(3)(A). [↑](#footnote-ref-40)
41. *See* Rule 1.1 (Competence) and Comment 1.1(6) of the Oklahoma Rules of Professional Conduct (“*ORPC*”), 5 O.S. Chap. 1, App. 3-A. [↑](#footnote-ref-41)
42. *Id.* Rule 1.4 (Communication). [↑](#footnote-ref-42)
43. The CTA application to existing entities is a transitional feature. Once existing entities have reported to the FinCEN database, only new entities or entities with amendments will report. The lawyers’ need to inform existing clients is likewise a one-time event. That is not to downplay the reporting by existing entities. FinCEN estimates that there are approximately 32.6 million entities currently operating within the U.S. that will be subject to reporting. *See* Final Rule, Section I, footnote 21, and Section V. [↑](#footnote-ref-43)
44. *Id.* Comment 1.4(5) (“The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.”) [↑](#footnote-ref-44)
45. The client would presumably be responsible for updating reports. But lawyers may undertake to remind clients periodically of their duty to update. Alternatively, the engagement letter could specifically negate any obligation of a lawyer to verify or update beneficial ownership. [↑](#footnote-ref-45)
46. *See gen*., Brad Eric Scheler, Gary L. Kaplan, and Jennifer L. Rodburg, Fried, Frank, Harris, Shriver & Jacobson LLP, “Director Fiduciary Duty in Insolvency”, posted to the blog *Harvard Law School Forum on Corporate Governance* (Apr. 15, 2020) (https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/) (noting that Delaware courts have rejected the notion that fiduciary duties shift when a company reaches the “zone of insolvency”. Upon actual insolvency, the duty may expand to the creditors, but the duty will apply to all residual claimants including the shareholders if the possibility exists that the company might return to solvency.) [↑](#footnote-ref-46)
47. *In re Toys “R” US, Inc*., 642 B.R. 727, 747 (Bankr. E.D. Va. 2022). [↑](#footnote-ref-47)
48. The charter provided that directors will not be personally liable for breaches of their duty of care if the alleged breach did not violate the duty of loyalty, was not an act or omission not in good faith or did not involve intentional misconduct or a knowing violation of law. [↑](#footnote-ref-48)
49. *Citing Brehm v. Eisner* (*In re Walt Disney Co. Derivative Litig.*), 906 A.2d 27, 52 (Del. 2006); and *Cede & Co. v. Technicolor, Inc*., 634 A.2d 345, 371 (Del. 1993). [↑](#footnote-ref-49)
50. *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 52. [↑](#footnote-ref-50)
51. *Citing Frederick Hsu Living Tr. v. ODN Holding Corp*., C.A. No. 12108- VCL, 2017 WL 1437308, at \*24 (Del. Ch. Apr. 14, 2017) (“the fact that a corporation is bound by its valid contractual obligations does not mean that a board does not owe fiduciary duties when considering how to handle those contractual obligations.”). [↑](#footnote-ref-51)
52. 2022 OK CIV APP 16. [↑](#footnote-ref-52)
53. 16 O.S. §19. [↑](#footnote-ref-53)
54. *Id*. at §29. [↑](#footnote-ref-54)
55. *Southwest Petroleum Co. v. Logan*, 1937 OK 473, ¶14, 71 P.2d 759; *Williamson v. Needles*, 1942 OK 409, ¶13, 133 P.2d 211; and *G.A. Nichols Inc. v. Stoddard*, 1952 OK 131. 242 P.2d 742. [↑](#footnote-ref-55)
56. *Morton v. Clearview Homes*, 1958 OK 55, ¶0, 324 P.2d 543. [↑](#footnote-ref-56)
57. *Grand Crest* at ¶26. [↑](#footnote-ref-57)
58. *Id*. [↑](#footnote-ref-58)
59. *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (“a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable”). [↑](#footnote-ref-59)
60. 2022 Del. Ch. LEXIS 1 (Del. Ch. Jan. 3, 2022). [↑](#footnote-ref-60)
61. C.A. No. 2020-0657-SG (Del. Ch. Feb. 14, 2022) and (Del. Ch. June 3, 2022). [↑](#footnote-ref-61)
62. Stockholder agreements often impose obligations and restrictions on stockholders to facilitate significant transactions, including drag-along terms, voting agreements, and waivers of various stockholder rights. [↑](#footnote-ref-62)
63. *See* “Down on the Street: A Special Report on American’s Capital Markets”, *The Economist* (Nov. 25, 2006) (“In theory, a higher standard of corporate governance should result in a higher valuation, since listing in a well-regulated market shows a commitment from a company that it will not abuse investors.”). [↑](#footnote-ref-63)